No. 02-682

Supreme Court, U.S.
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In The
Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF ALABAMA, DELAWARE, INDIANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA AND UTAH IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI

The States have significant responsibilities in both antitrust enforcement and enforcement of the regulatory scheme developed by the Telecommunications Act of 1996. The States, therefore, have a strong interest in promoting sound judicial decision-making in the application of antitrust law to activities undertaken pursuant to the Telecommunications Act of 1996 and in promoting the rational development of case law in this area. There are difficult legal issues inherent in subjecting incumbent providers of local telephone services to new duties to assist their competitors, while continuing their obligations under antitrust law. These difficulties counsel a cautious approach which has been utterly forsaken by the decision of the Second Circuit.

ARGUMENT

I. UNDER ANTITRUST PRINCIPLES RECOGNIZED BY THIS COURT, RESPONDENT FAILS TO STATE A CLAIM.

The Second Circuit's opinion expands the duty of incumbent providers of local telephone service to assist competitors beyond the antitrust duties imposed on monopolists under Section 2 of the Sherman Act. Although the Telecommunications Act of 1996 ("the Act") imposes new obligations on incumbent providers to open their markets to competition, it does not alter the applicability of the Sherman Act. Instead, Congress expressly provided that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. § 152 note. Thus, the elements of an

antitrust action remain the same. The Second Circuit's opinion is problematic because it permits an antitrust claim to go forward absent factual allegations supporting all elements required under Section 2 of the Sherman Act.

The Act provides that incumbent local exchange carriers must allow entering competitors to interconnect with incumbents' telephone networks on terms to be worked out between the incumbents and the new entrants. State public utility commissions ("State Commissions") are to arbitrate the agreements between the incumbents and their competitors, and the State Commissions have authority to set rates "that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002). *See also* 47 U.S.C. 251(c).

The duties imposed on a monopolist under the antitrust laws, however, are different from the duties imposed on the incumbents under the Act. Under antitrust law, even a firm with monopoly power has no general duty to assist its rivals. *Aspen Skiing Co. v. Highlands Skiing Corp.*, 472 U.S. 585, 600-01 (1985). *See also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) (Posner, J.). In addition, a monopolist that has obtained its position lawfully can reap the benefits of its success by demanding whatever rates it can receive from the marketplace. Such conduct, standing alone, is not an antitrust violation. *Alaska Airlines v.*

United Airlines, 948 F.2d 536, 548-49 (9th Cir. 1991).[1] As this Court has acknowledged:

> The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

A. The Traditional Elements of a Section 2 Claim

In order for "monopolization" to be a violation of Section 2 of the Sherman Act, two elements must be shown: (1) the possession of monopoly power, defined as the power to control prices or exclude competition, *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); and (2) deliberateness. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The "deliberateness" element has been defined as "the *willful* acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* (emphasis added). Deliberateness has also been described as "anticompetitive,"

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[1] In stark contrast to the regulation of telephone rates by State Commissions, the antitrust laws specifically decline the responsibility of setting the rates that monopolists can charge. *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute").

"predatory," or "exclusionary." 3 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, 650c, at 69 (2d ed. 2002); *Aspen Skiing*, 472 U.S. at 602.

The deliberateness element is absent when a monopolist engages in conduct that disadvantages a competitor, but does so in pursuit of legitimate business objectives or to enhance efficiency. *See, e.g., Aspen Skiing*, 472 U.S. at 604-05; *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990) ("A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits is not sufficient."). The monopolist who violates Section 2 is the one who adversely affects competition by engaging in economically irrational behavior. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (the sacrifice of short-term profits may be viewed by the predator as "an investment in future monopoly profits (where rivals are to be killed)," *quoting* Robert Bork, *The Antitrust Paradox* 145 (1978)); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("If a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, it has shown predation by that defendant.").

This Court's opinion in *Aspen Skiing* further explained that, in order for conduct to be "exclusionary," it must do more than merely harm a smaller rival. It must impair competition in an "unnecessarily restrictive way." 472 U.S. at 605. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* (*quoting* Bork, *supra*, at 138 (1978)).

A monopolist does not have to cooperate with its rivals under the antitrust laws, unless the refusal to deal constitutes purposeful and anticompetitive conduct. *Aspen Skiing*, 472 U.S. at 600-01. In order for failure to cooperate with a rival to be "exclusionary" under Section 2, at a minimum it must occur without a legitimate business or efficiency reason and make no economic sense other than as an intentional effort to injure competition by preserving or acquiring higher monopoly profits. *Id.* at 608, 610-11. *See also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992).

Respondent failed to allege exclusionary conduct in this case. The Second Circuit, however, decided that the amended complaint was sufficient to state a claim under either the essential facilities doctrine or a monopoly leveraging theory. Pet. App. 29a. Its decision, if upheld, would unreasonably expand the scope of antitrust law in the telecommunications context beyond any theory approved by this Court, a result not contemplated by the Act and not necessary to enforce either the Act or antitrust law.

B. The Theories Relied Upon by the Second Circuit, Without More, Do Not Establish an Antitrust Violation.

1. Even if the Essential Facilities Doctrine Can Serve as the Basis for a Section 2 Monopolization Claim, the Traditional Elements of the Section 2 Claim Must Be Pled.

First, this Court has "never adopted" the essential facilities doctrine as a basis for liability in a Section 2 case. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer,

J., concurring in part and dissenting in part). In addition, the doctrine has been widely criticized by leading antitrust commentators. *See, e.g.*, 3A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 771c, at 173 (2d ed. 2002) ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"); Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 443 (2002) ("If U. S. scholarship were the last word on the subject, one would be led to conclude that the essential facilities doctrine should be described narrowly or fully abandoned.").[2]

Second, although respondent may have adequately pled the elements peculiar to an essential facilities claim,[3] it still must allege all other elements of a Section 2 monopolization violation. As discussed above, a Section 2 violation requires "exclusionary" or "predatory" conduct by the monopolist. The essential facilities doctrine does not and should not be permitted to eliminate the need to allege deliberateness in order to state a Section 2 violation. *See, e.g.*, 3 Areeda & Hovenkamp, *supra*, ¶ 650c at 69. In addition,

[2] There are four elements that are said to establish liability under the essential facilities doctrine:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[3] The Second Circuit found that respondent did allege that AT&T's access to petitioner's local loop was essential to AT&T's ability to compete in the local telephone service market and that it would be prohibitively expensive for it to create independent facilities. Pet. App. 29a.

several lower courts have rejected essential facilities claims in regulated industries because the defendants were found to have legitimate business reasons for denying access to the essential facility. *See, e.g., Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984) (holding that AT&T's regulatory justification defense for denial of access to its telephone network, based on its status as an entity regulated under a "public interest" standard, was reasonable and made in good faith, rather than because of competitive considerations); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992) (holding that defendant had a legitimate business reason for denying access to its low-cost power source, so that its entire customer base could benefit from its low-cost power, rather than having it siphoned off by only a few customers).

Even under an essential facilities theory, respondent must show that petitioner has an *antitrust* duty, not just a duty under the Act, to provide access to the local exchange network. In order to establish this antitrust duty, respondent must allege that petitioner's failure to provide such access would not make economic sense unless it intended to harm competition in the local telephone service market.[4] Respondent has not done so.

[4] In their amicus brief supporting petitioner's request for review by this Court, the United States and the Federal Trade Commission noted that respondent did allege that petitioner "had no valid business reason" for its behavior. Brief for the United States and the Federal Trade Commission as Amici Curiae, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, on petition for a writ of certiorari, Dec. 17, 2002, at 13. As the United States pointed out, however, a conclusory legal assertion couched as a factual allegation is not a sufficient

(Continued on following page)

2. Allegations of a Dangerous Probability of Monopolizing a Second Market are Necessary to State a Monopoly Leveraging Claim.

As with the essential facilities doctrine, the Second Circuit treats monopoly leveraging as if it constitutes a stand-alone violation of Section 2, absolving respondent of the need to plead all necessary elements of such a violation. This Court has never accepted such a view of monopoly leveraging. The Second Circuit found that a monopoly leveraging claim can be made by alleging that a monopolist in one market is using that power to gain a "competitive advantage" in a second market. Pet. App. 30a. But this sets the bar too low. As this Court has explained, a firm does not violate Section 2 unless it actually monopolizes or dangerously threatens to monopolize the second market. *Spectrum Sports,* 506 U.S. at 459. No antitrust claim is made under the Court's existing antitrust jurisprudence when the firm is alleged merely to use its dominant position in one market to gain a competitive advantage in another. *See* 3 Areeda & Hovenkamp, *supra*, ¶ 652a, at 89-90.

Some circuits have reserved judgment on whether a monopoly leveraging claim requires showing a dangerous probability of monopolizing a second market instead of showing merely that the monopolist gained a competitive advantage in that market. *See, e.g., M & M Med. Supplies &*

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allegation of exclusionary conduct that makes no economic sense except to harm competition. *Id.* at 14 (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 169 (4th Cir. 1992) (en banc); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984); *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 613 (8th Cir. 1994). However, two other circuits have decided the issue. They require proof of a dangerous probability of success in monopolizing the second market, noting that the antitrust laws allow monopolies that have arisen from efficiency and natural market forces, and therefore, attaching antitrust liability when a firm merely gains a competitive advantage in another market does violence to traditional Section 2 analysis. *Fineman v. Armstrong World Industries*, 980 F.2d 171 (3d Cir. 1992); *Alaska Airlines,* 948 F.2d at 536.

Respondent's amended complaint alleges that petitioner has monopoly power over a wholesale market in which it provides access to the local network exchange to competitive carriers. J.A. 29. Respondent further alleges that petitioner uses its power in the wholesale market to gain a competitive advantage in a retail market in which both petitioner and its competitors sell local telephone service to consumers. *Id.* A claim under the Sherman Act, however, is not implicated by the conduct pled unless respondent also alleges that petitioner was using anticompetitive behavior to create a second monopoly in the retail local telephone service market:

> . . . the elements of the established actions for "monopolization" and "attempted monopolization" are vital to differentiate between efficient and natural monopolies on the one hand, and unlawful monopolies on the other. . . . The anticompetitive dangers that implicate the Sherman Act are not present when a monopolist has a lawful monopoly in one market and uses its power to

> gain a competitive advantage in the second market. By definition, the monopolist has failed to gain, or attempt to gain, a monopoly in the second market. Thus, such activity fails to meet the second element necessary to establish a violation of Section 2. *Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation.*

Alaska Airlines, 948 F.2d at 548 (emphasis added). This element is missing from respondent's allegations.

In sum, just as the allegation of a monopoly position in a market, by itself, does not state a Section 2 monopolization claim, so, too, the allegation of the *use* of monopoly power, without more, does not state a claim for the deliberate acquisition or maintenance of monopoly power in violation of Section 2. A necessary element of the claim is that the challenged conduct lacks any business justification other than an intent to harm competition. This element is absent from the Second Circuit's two antitrust theories of liability and was not alleged in respondent's amended complaint. Thus, the Second Circuit's decision transforms duties that the incumbent local exchange carriers must perform under the Act (including duties under incumbent-competitor contracts arbitrated by State Commissions) into antitrust duties. Such an expansion of potential antitrust liability eliminates one of the traditional elements of a Section 2 Sherman Act claim. It has no precedent in this Court's jurisprudence and is unwarranted.

II. IN PASSING THE TELECOMMUNICATIONS ACT OF 1996, CONGRESS INTENDED NEITHER TO EXPAND NOR TO CONTRACT THE AVAILABILITY OF AN ANTITRUST CLAIM.

A. State and Federal Regulation is a Proper Consideration in Antitrust Analysis.

"[W]here regulatory and antitrust regimes coexist, antitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies." *Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (citations omitted) (Breyer, C.J.). This is not to say that a regulated entity has immunity from antitrust laws or that antitrust laws are unenforced in a regulated environment. *Id.* at 21-22. Rather, as the First Circuit recognized in *Concord*, "antitrust courts can and do consider the particular circumstances of an industry" and adjust the rules to the existence, extent and nature of regulation. *Id.* at 22-23 (citation omitted). In *Concord*, the First Circuit noted the difficulty in addressing the antitrust allegation without acting like a regulatory agency. *Id.* at 25-26. When a function is already served by regulators, courts are rightfully reluctant to perform such an undertaking. Similarly, the Seventh Circuit has explained that "[a]n industry's regulated status is an important 'fact of market life,' the impact of which on . . . competitive decisions is too obvious to be ignored." *MCI Communications Corp.*, 708 F.2d at 1105 (citation omitted).

Respondent attempted to allege an antitrust action arising out of conduct that is the subject of extensive state and federal regulation. The Second Circuit abandoned traditional antitrust analysis to permit respondent's claim to go forward. In so doing, it has written substantial new

antitrust law without adequate consideration of the regulated nature of the relevant market. Although this Court has not addressed the question whether or how a regulatory scheme should impact antitrust analysis, the opinions of the First and Seventh Circuits provide useful guidance.[5] At a minimum, they support a finding that the Act was not intended to create new and lower standards for pleading an antitrust cause of action in the telecommunications industry. But that is precisely what the Second Circuit did.

B. By Enacting the Telecommunications Act of 1996, Congress Built on the Traditional Authority of States to Regulate Providers of Local Telephone Service.

The express purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). To that end, the Act calls upon the States to perform an important role in facilitating transition to a competitive market. The provisions of the Act recognize and rely upon "the benefit of employing the vast resources and expertise of State public service commissions to resolve ongoing disputes arising from the

[5] A leading antitrust scholar claims that the antitrust savings clause in the Act "preserves not merely the basic application of the antitrust laws, but also the system of regulatory deference and express or implied immunity in favor of federal and state agencies that has always governed antitrust disputes in regulated or partially deregulated industries." 3A Areeda & Hovenkamp, *supra*, ¶ 785b2 at 292.

administration and interpretation of interconnection agreements." *Bell Atlantic-Maryland Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 305 (4th Cir. 2001), *vacated and remanded on other grounds*, 535 U.S. 635 (2002). The Act employs the State Commissions in a variety of roles to carry out its purposes.

Under the Act, State Commissions may be called upon to mediate differences between incumbents and competitors engaged in negotiating the terms of interconnection agreements. 47 U.S.C. § 252(a)(2). They serve as arbitrators of open issues that cannot be resolved through the parties' good faith negotiations. 47 U.S.C. § 252(b). In the context of these arbitrations, State Commissions may establish rates for interconnection, services, or network elements, and may impose conditions upon the parties that they deem necessary to ensure that the interconnection obligations created by the Act are met. 47 U.S.C. §§ 252(c), (d). Ultimately, the State Commissions must approve all interconnection agreements, whether developed through negotiation or arbitration. 47 U.S.C. § 252(e).

By including in the Act a statutory role for State Commissions, Congress utilized the infrastructure and expertise closest to the local exchange service markets – State Commissions – to facilitate the transition to a competitive market. Congress' reliance on that regulatory role for the States argues against the Second Circuit's expansion of antitrust claims to include claims based solely on the duties imposed by the Act. As shown by the savings clause, found at 47 U.S.C. § 152 note, the Act was not intended to limit antitrust claims, but neither was it intended to alter the elements or lower the bar for successfully pleading them.

C. The Decision of the Second Circuit is Unreasonably Expansive in Light of the Regulatory Oversight Established by Congress and Could Hamper the States' Ability to Facilitate Transition to Market Competition.

There is currently a combined state and federal regulatory system in place pursuant to the Act to facilitate the transition of the local telephone market to competition. In fact, the conduct that respondent complains of was the subject of a regulatory proceeding before the FCC and the New York Public Service Commission.[6] Any antitrust claim based on the same conduct must conform to traditional antitrust law. As explained above, respondent's pleading omits allegations that, if true, would establish a necessary element of an antitrust cause of action. Omitting these allegations expands the reach of antitrust jurisprudence. Such an expansion could be counterproductive in the context of the regulatory framework established by Congress. Where such an expansion was not clearly intended by Congress, it is important that it not be undertaken without recognition of the impact that such an expansion of antitrust law in the telecommunications area might have, given the regulatory structures in place for enforcement of the Act.

[6] Order, *In re: Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the State of New York*, 15 F.C.C.R. 5413 (Mar. 9, 2000); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (N.Y.P.S.C. Feb. 11, 2000); Order Addressing OSS Issues, *MCI WorldCom Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (N.Y.P.S.C. Jul. 27, 2000).

There is inherent tension between the operation of a congressionally prescribed state and federal regulatory structure, like that provided by the Act, and the use of antitrust laws to enforce the provisions of the same Act. This tension arises on at least three fronts:

- the unique regulatory expertise in highly technical subject matter that resides in the State Commissions and the FCC, and which is not typically found in courts hearing private antitrust enforcement actions;
- the potential for conflicting adjudications regarding incumbent obligations arising under the Act in regulatory proceedings as compared to federal antitrust actions and the effect such uncertainty might have on the anticipated transition of the market to competition; and
- the absence, in private antitrust actions, of the unique representation of the public interest provided by the state regulatory body.

The existence of these tensions does not mean that the regulatory mechanisms set forth by Congress preclude the continued operation of traditional antitrust principles in the telecommunications industry. The tensions do underscore, however, the complexity implicit in the coexistence of the two enforcement schemes and the resulting need for caution in using the Act as an occasion for reducing the elements necessary to make out a claim under Section 2 of the Sherman Act. The consequences of unnecessary and unanticipated changes in the reach of antitrust law as applied to activity under the Act are difficult to predict, and the careful balance of competing concerns demanded by the nature of the telecommunications market, counsel

against adoption of the ill-advised decision of the Second Circuit in this case.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Second Circuit should be REVERSED.

Respectfully submitted,

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